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ABSTRACT

In this statement the Assistant Attorney General (Civil Rights Division) discusses the Reagan administration's plans for ensuring the enforcement of equal employment opportunities. Civil rights legislation and court litigation involving racial quotas and preferential treatment are discussed. While the author stresses the Justice Department's commitment to seeking affirmative remedies such as back pay, retroactive seniority, reinstatement, and hiring and promotional priorities, the use of quotas is said to be unjustified. Rather, the requirement of comprehensive employment recruitment techniques is said to be one way to ensure that employers follow nondiscriminatory, sex and race neutral employment practices. (Author/JCD)

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Speech of William Bradford Reynolds
Assistant Attorney General
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before

the

Tenth Annual Personnel Conference
of Executive Enterprises, Inc.

on

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THE DEPARTMENT OF JUSTICE LOOKS AT EEO ENFORCEMENT

When the United States Supreme Court decided the landmark Brown v. Board of Education case in 1954, it marked the beginning of a profound evolutionary development in American society. The Brown decision started a process that moved Congress, the courts and millions of citizens to a kind of national introspection. Open recognition of the inescapable fact that blacks were officially second-class citizens in many places in our country finally prompted Congress in 1957 to pass legislation attempting to assure equal voting rights. Thereafter came a steady flow of national civil rights legislation: The Civil Rights Act of 1960 (voting); the Omnibus Civil Rights Act of 1964 (public accommodations, school desegregation, federal programs, employment, etc.); the Voting Rights Act of 1965; and the Civil Rights Act of 1968, to name just a few of the milestone's in this area.

Each of these important pieces of legislation assigned primary enforcement responsibilities to the Attorney General of the United States. Over the years the Department, through its Civil Rights Division, has initiated or participated in hundreds of enforcement actions. Aggrieved private citizens have filed thousands of private actions asserting their individual rights as defined by Congress. Elaborate administrative mechanisms such as the EEOC, OFCCP, and independent Civil Rights offices of different agencies have been established to provide remedies and federal incentives. While it is next

to impossible to quantify the changes in our society over the last quarter century, I think all would agree that there has been a widespread reshaping of conditions and attitudes in the area of civil rights. Certainly the federal government -- the Congress, the courts and the executive branch -- has in the ensuing years amply manifested its deeply held commitment to ridding our nation of the blight of racial discrimination.

That commitment is as unwavering today as in the recent past. President Reagan, Vice President Bush, Attorney General Smith, and this entire Administration are dedicated to continuing the battle being waged against discrimination based on race. Notwithstanding the victories that have been won, it is painfully apparent to all Americans that the fight is not yet over. One of my responsibilities as the Assistant Attorney General for Civil Rights is to assist the Attorney General and the President in developing the assault of this Administration against the lingering evils of racial discrimination. In this connection, my job -- indeed, my sworn duty -- requires that I uphold and enforce the Constitution and the laws of the United States. In discussing with you today how those obligations are being fulfilled, I think it is imperative to begin with a review of what has been accomplished and to try to identify what we have yet to achieve.

An assessment of the evolution of civil rights in America since 1954 reflects clearly that our Nation has progressed attitudinally as well as statistically. Our

national consciousness has been raised, and the profound injustice of discrimination on the basis of immutable and irrelevant personal characteristics such as color is broadly recognized and condemned.

As a consequence, racial and other stereotyping is declining and most people now accept the legal and moral imperative to treat people equally regardless of race, color, sex, or national origin. Obviously, and sadly, there are exceptions, and enforcement action is still required. But it is critical, in my view, to appreciate that such circumstances are the exception and no longer the rule.

I would submit to you that this attitudinal progress in the field of civil rights has made the statistical progress possible. After a shameful history of ignoring the injustice of racial discrimination, a consensus developed in Congress and the country that racial discrimination is wrong and no longer ought to be tolerated in any form. This consensus provided the element from which democratic government derives its legitimacy: the consent of the governed.

My concern -- and that of the Administration -- is that this concensus is breaking down, and Americans are again being divided along racial lines -- in particular over the issue of racial quotas. It is not the concept of "affirmative action" itself that has caused the turmoil. Most Americans, I think, now agree that employers should take affirmative steps -- going beyond mere passive nondiscrimination -- to

ensure that all barriers to employment and advancement of minorities are permanently removed so that applicants and employees of all races are enabled to attain the level of achievement warranted by their industry and talent. This Administration -- media reports to the contrary notwithstanding -- supports affirmative action, as the President himself once again made crystal clear in his press conference just last Tuesday. We do not support, however, and in litigation will neither insist upon nor endorse, the use of racial quotas -- by that or any other name -- designed to provide preferential treatment to nonvictims of employment discrimination. Governmental imposition of employment preferences, in the form of racial quotas, to remedy discrimination is a phenomenon of relatively recent origin. As I have said on prior occasions, as well intended as such remedial action might be, it lacks authorization in federal law.

The principal federal statute in this area, Title VII of the 1964 Civil Rights Act, prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. . . ." (42 U.S.C. § 2000e-2(a)(1)). That Title VII mandates color blindness in employment decisions was made clear not only in the Act's language, but also in the legislative debates preceding its passage. For instance, Senator Hubert Humphrey, a leading advocate of social equity and racial equality and the foremost proponent of the 1964 Civil Rights

Act, decried the idea that Title VII would countenance racial quotas, remarking: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race should not be used for making personnel decisions." 110 Cong. Rec. 6553 (1964). In like manner, remarks by the proponents of the legislation endorsed the view that Title VII established a principal of "colorblindness in employment." Id. at 6564. And in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), the Supreme Court interpreted Title VII to prohibit racial discrimination against white employees upon the same standards as would be applicable were they nonwhite.

Plainly, Title VII establishes the federal right of all individuals to be free from employment discrimination on the basis of race, color, religion, sex, or national origin. Equally apparent, remedying a violation of Title VII requires that the individual victim of unlawful discrimination be placed in his or her "rightful place"; that is, the place that he or she would have attained in the absence of the unlawful discrimination. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Specific affirmative relief to individual victims of unlawful discrimination is based not on the victim's race or sex, but on the fact that he has suffered employment discrimination in violation of federal law. Such "rightful place" relief is thus justified despite the fact that other employees, innocent of any wrongdoing, must make way for the discriminatee. Those who have been unjustly and unlawfully

deprived receive their due, and those who have been discriminatorily favored surrender some of the largesse capriciously conferred on them. That this "rightful place" remedy is defined by race is merely an incident of the fact that the original discrimination was defined by race.

During the 1960's, minorities made significant educational and economic strides with the assistance of statutory and decisional law outlawing racial discrimination and granting rightful place relief to discriminatee. Minorities thus demonstrated a capacity to compete effectively with members of other groups under a regime of colorblindness.[1/]

Impatience with the progress of minorities toward statistical parity with whites in the employment field, however, led some to urge use of racial formulas, such as hiring quotas and fixed goals, designed to achieve a certain balance among the races in the work place; and the concept of race-conscious "affirmative action" was born. This new concept of "affirmative action" discarded the notion that a preference is permissible only when necessary to place an individual victim of proven racial discrimination in the position he would have attained but for the discrimination. Rather, proponents of this view sought the granting of preferences,

1/ See T. Sowell, Affirmative Action Reconsidered (1975); T. Sowell, Knowledge and Decision 258-59, 355-56 (1980); R. Freeman, Black Economic Progress Since 1964, The Public Interest 52 (1978); Statement of Morris Abrams before Hatch Subcommittee on Constitutional Rights, at 9 (May 4, 1981).

not simply to individuals who had in fact been injured, but to an entire group of individuals, based only on their race or sex. It mattered not that those who benefitted had never been wronged by the employer, or that the preferential treatment afforded to them was at the expense of other employees who were themselves innocent of any discrimination or other wrongdoing.

Judicial imposition of quota relief is generally justified on the reasoning that "underrepresentation" of protected groups in the workplace necessarily reflects unlawful past discrimination which can be remedied only through preferential employment practices. Equating "discrimination" with "underrepresentation" ignores the primary determinants of occupation selection in a free society: individual interests, industry, and abilities. As the United States Commission on Civil Rights recently pointed out, a widespread misunderstanding of statistics

> has lead to the rigid demand for statistical equal representation of all groups without regard to the presence or possible absence of discriminatory processes. Many people frequently leap from the misconception that unequal representation always means that discrimination has occurred to the correspondingly overstated position that equal representation is always required so that discrimination may be eliminated. (United States Commission on Civil Rights, Affirmative Action in the 1980's; Dismantling the Process of Discrimination, 31 (Nov. 1981) (emphasis in original))

Accordingly, in the Commission's words: "unequal results as a matter of law, therefore, are only quantitative suggestions

of discriminatory conduct; they do not conclusively establish the presence of illegal discrimination." Id. at 16.

Title VII and similar nondiscrimination statutes, as I have previously noted, establish and protect the right of individuals to be free from racial discrimination in the workplace, and affirmative "rightful place" relief for a violation is justified despite its adverse consequences to the disadvantaged incumbent employee because the incumbent is merely being deprived of benefits unjustly received at the expense of the discriminatee. Neither Title VII nor similar federal statutes, however, grant to particular groups a right to be free from underrepresentation in every occupation and workplace. And a preference based not on a person's status as the victim of unlawful employment discrimination, but rather solely on the person's membership in a particular racial group is, quite simply, racial discrimination.

By elevating the rights of groups over the rights of individuals, racial and sexual preferences are at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant. This kind of "affirmative action" needlessly creates a caste system in which an individual must be unfairly disadvantaged for each person who is preferred.

Nor is there any moral justification for racial quotas. Racial discrimination, based as it is on a personal characteristic that is both immutable and irrelevant to employment decisions, is offensive regardless of which race is victimized. It is no answer to the victim of reverse discrimination to say that quotas lack the invidious character, the stigmatizing effect, of discrimination against minorities. The consequences of racial discrimination are as real and as unjust no matter whose ox is gored. As one Supreme Court Justice has put it: "no discrimination based on race is benign, . . . no action disadvantaging a person because of his color is affirmative."

Finally, the beneficiary of preferential treatment who is hired or promoted into a desirable job or is admitted to a selective university is unavoidably stigmatized as an "affirmative action" employee or student. And all members of the preferred group, even those who would have made it anyway, fall under suspicion, from themselves and from others. The view soon becomes widespread that the achievement of members of the preferred group is of a lower order than that of members of the group which "did it on their own." The consequent damage to the self-esteem of members of the preferred group, and to the esteem in which they are held by their fellow students and workers, is unavoidable.

These very real and legitimate objections to racial quotas in employment strengthens this Administration's firm committment to the view that the Constitution and laws of the United States protect the rights of every person -- whether black or white, male or female -- to pursue his or her goals in an environment of racial and sexual neutrality. By embracing the principle of race and sex neutrality in the field of public and private employment, the Justice Department in no way intends to relax its commitment to remedy proven discrimination. Fidelity to the ideal of equality demands that no individual be disadvantaged in the workplace because of unlawful discriminatory practices. The Department is firm in its resolve to seek, in suits under Title VII and similar statutes, affirmative remedies such as back pay, retroactive seniority, reinstatement, and hiring and promotional priorities, to ensure that any individual suffering employment discrimination on account of race or sex is placed in the position that he or she would have attained in the absence of such discrimination. Similarly, appropriate relief should and will be sought for those qualified individuals shown to have been discouraged from seeking positions because of past practices of unlawful discrimination on the part of the employer. The Department of Justice will be unyielding in its enforcement efforts to deter and remedy completely identifiable injuries attributable to discrimination in the workplace.

Nor do we plan any change in the nature of suits brought to enforce federal law. Contrary to some newspaper accounts, we have no intention of limiting ourselves to separate lawsuits on behalf of separate individuals. We will, as in the past, bring "pattern or practice" suits against employers engaging in discriminatory practices affecting a substantial number of applicants or employees; and we will seek relief on behalf of all identifiable victims of discriminatory practices -- whether they be dozens or hundreds. In pursuing such cases, we will of course follow settled Supreme Court decisions holding that an employer shown to have engaged in a pattern of discriminatory employment practices must bear the burden of proving that a black or female claimant was denied employment or promotion for nondiscriminatory reasons. Franks v. Bowman Transportation Company, 424 U.S. 747 (1975); Teamsters v. United States, 431 U.S. 324 (1976).

In addition to seeking full redress for individual victims, the Department will continue to seek injunctive relief directing the employer or make future employment decisions on a nondiscriminatory race-neutral and sex-neutral basis. To ensure that the injunction is followed, we will require as part of the remedy that the employer make special efforts to reach minority or female workers through comprehensive use of employment recruitment techniques, such as media advertising and visiting high school and college campuses.

In connection with this enhanced recruitment of minorities or women, the Department will insist that the employer periodically file records of its recruitment efforts.

Where appropriate, we will seek percentage recruitment goals for monitoring purposes. Such recruitment goals will serve as a triggering mechanism for Department inquiry into whether the employer has complied with the injunctive command to end its discriminatory practices. These recuitment goals will be related to the percentage of minority or female applicants that might be expected to result under a non-discriminatory employment policy, after job related factors, such as age, education, and work experience among various applicants are taken into account. When combined with fair and nondiscriminatory selection procedures, they should be sufficient to correct the effects of past discriminatory practices.

Because there may be legitimate, nondiscriminatory reasons underlying an employer's failure to satisfy a particular goal, the Department will not treat recruitment goals as inflexible standards which must be met by the employer without regard to qualification. At the same time, we will be alert to guard against employers, in an overzealous attempt to satisfy recruitment goals, engaging in reverse discrimination. Were we to treat the matter in any other light we would be vulnerable to the charge that we have sought to remedy

discrimination with discrimination. This the Department will not do.

Judicial or administrative imposition of racial quotas in employment introduces into federal nondiscrimination laws a tolerance for the very wrong those laws were intended to eradicate. Where racial quotas have been imposed, they have driven a wedge of racial resentment between fellow workers. The issue has divided the country, engendering new racial tension and threatening the hard-fought gains of the past three decades. In our view, adherence to the color-blind ideal of equal opportunity for all -- the ideal that guided the framers of the Constitution and the drafters of Title VII -- is essential to preserving the national consensus condemning discrimination in the workplace, and holds the greatest promise of realizing the proclamation in the Declaration of Independence of equality for all Americans.